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October 9, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Flat Wireless, LLC v. Cellco Partnership d/b/a Verizon Wireless, EB Docket No. 15-147, File No. EB15-MD-005

Dear Ms. Dortch:

I am enclosing for filing in the above proceeding the Legal Analysis of Verizon and the supporting Declaration of Dr. Hal J. Singer. We also have enclosed an updated version of Verizon's Opposition to Interrogatories to include citations to the Legal Analysis. Please contact me if you have any questions regarding this filing.

Very truly yours,



Steven G. Bradbury

SGB
Enclosures

Andre J. Lachance
Assistant General Counsel



October 9, 2015

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CONFIDENTIAL AND HIGHLY CONFIDENTIAL MATERIAL ENCLOSED

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

ATTN: Rosemary McEnery
Deputy Chief
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***Flat Wireless, LLC, Inc. v. Cellco Partnership d/b/a Verizon Wireless***
EB Docket No. 15-147; File No. EB-15-MD-005
Verizon Request for Confidential Treatment

Dear Ms. Dortch:

Verizon hereby requests confidential treatment of documents and information provided in and with the attached Legal Analysis and Declaration of Dr. Hal J. Singer. We seek confidential treatment of these materials pursuant to the protective order adopted by the Enforcement Bureau,¹ and sections 0.457(d)(2), 0.457(g)(3), 0.459 and 1.731 of the Commission's Rules, 47 C.F.R. §§ 0.457(d)(2), 0.457(g)(3), 0.459, 1.731. Accordingly, these materials may be used and disclosed solely in accordance with the limitations and procedures of 47 C.F.R. §§ 1.731(b)-(e).

The documents and information for which Verizon seeks confidentiality fall squarely within the requirements of Section 0.459 of the Commission's rules, and disclosure of this information would result in competitive harm to Verizon. In support of this request, Verizon provides the following information pursuant to Sections 0.457(d)(2) and 0.459(b) of the Commission's Rules.

¹ Protective Order, EB Docket No. 15-147, File No. EB-15-MD-005 (Aug. 31, 2015).

1. Extent of Nondisclosure Requested. Verizon is requesting confidential treatment for all documents marked as “Confidential” and “Highly Confidential” as well as information designated “[BEGIN CONFIDENTIAL]” and “[END CONFIDENTIAL]” and “[BEGIN HIGHLY CONFIDENTIAL]” and “[END HIGHLY CONFIDENTIAL],” in the Legal Analysis and associated Declaration. The documents and information subject to this request generally relate to commercial negotiations and arrangements between Verizon and Flat Wireless, LLC, Inc. (“Flat” or “Complainant”), and to commercial arrangements between Verizon and other entities, that are subject to non-disclosure agreements or that Verizon does not otherwise disclose publicly.
2. Proceeding/Reason for Submission. Verizon is submitting the enclosed information pursuant to Section 1.724 of the Rules, 47 C.F.R. § 1.724, and in accordance with the Enforcement Bureau’s July 15, 2015 letter to Verizon and Flat and the Enforcement Bureau’s September 21, 2015 grant of the parties’ Joint Motion to Revise Scheduling Order, as part of Verizon’s Answer to Flat’s formal complaint in the above-referenced proceeding.
3. Nature of Confidential Information. The information contains commercially sensitive information that may be withheld from public disclosure under FOIA Exemption 4. The Commission has long recognized that, for purposes of Exemption 4, “records are ‘commercial’ as long as the submitter has a commercial interest in them.” *Robert J. Butler*, 6 FCC Rcd 5414, 5415 (1991), citing *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *American Airlines v. National Mediation Board*, 588 F.2d 863, 868 (2d Cir. 1978). The information is clearly “commercial”² in nature. It includes information relating to Verizon’s roaming pricing and agreements, wholesale relationships, Verizon’s business practices and methods, and commercially sensitive and confidential agreements with Defendant and other parties. Further, the documents are plainly “confidential” in that they “would customarily not be released to the public.”³ Courts have elaborated that material “is ‘confidential’ . . . if disclosure of the information is likely to have *either* of the following effects: (1) to impair the government’s ability to obtain necessary information in the future; *or* (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”⁴ Both of these considerations plainly apply in this instance, as further explained in point (5) below.

²See *Board of Trade v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 403 & n.78 (D.C. Cir. 1980) (courts have given the terms “commercial” and “financial,” as used in Section 552(b)(4), their ordinary meanings).

³*Critical Mass Energy Project v. NRC*, 975 F.2d 871, 873 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993).

⁴*National Parks and Conservation Ass’n v. Morton*, 498 F.2d 764, 770 (D.C. Cir. 1974) (footnote omitted) (emphasis added); see also *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993).

4. Competitiveness of Market. The commercial information provided derives from and relates to Verizon's provision of mobile wireless services and thus concerns a service "that is subject to competition," 47 C.F.R. § 0.459(b)(4). *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 28 FCC Rcd 3700 (2013).
5. Harm from Disclosure. The commercial information in the enclosed documents is confidential because its release would likely cause competitive harm to Verizon. The information is clearly commercial in nature. Further, the documents are plainly "confidential" in that they "would customarily not be released to the public."⁵ Further, evidence revealing "'[a]ctual competition and the likelihood of substantial competitive injury' is sufficient to bring commercial information within the realm of confidentiality."⁶ The Commission has recognized that disclosure of information relating to pricing, costs, business practices and methods and related information to competitors can cause competitive harm, and is thus competitively sensitive and subject to Exemption 4.⁷
6. Measures Taken to Prevent Unauthorized Disclosure. Verizon treats the documents and information subject to this request as confidential and subject to non-disclosure agreements, and does not publicly disclose this information. Verizon also limits the internal circulation of this information to only those with a need-to-know.
7. Public Availability and Previous Disclosure to Third Parties. The documents for which confidentiality is sought are not made available to the public and have not been disclosed to parties other than Flat. Documents disclosed to Flat have been subject to non-disclosure agreements.
8. Requested Duration of Nondisclosure. The enclosed information should never be released for public inspection, as it contains commercially sensitive, confidential information, the release of which could adversely affect Verizon's competitive position.

For the foregoing reasons, Verizon respectfully requests that the Commission withhold these documents and information from public inspection, subject to the safeguards of section 1.731 of the Rules.

⁵*Critical Mass Energy Project v. NRC*, 975 F.2d 871, 873 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993) (citing the Senate Committee Report).

⁶ *Public Citizen Health Research Group*, 704 F.2d at 1291, quoting *Gulf & Western Industries v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979).

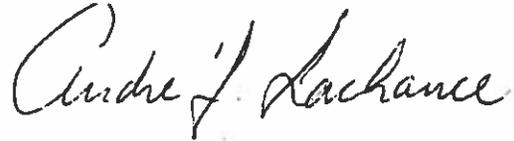
⁷ *See, e.g., Josh Wein, Warren Communications News, Request for Inspection of Records*, Memorandum Opinion and Order, 24 FCC Rcd 12347, 12352-53 (2009).

October 9, 2015

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Should you need additional information with regard to this request, please contact the undersigned at (202) 515-2439.

Respectfully submitted,

A handwritten signature in black ink that reads "Andre J. Lachance". The signature is written in a cursive style with a large initial "A".

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Attorney for Verizon Wireless

CONFIDENTIAL TREATMENT
REQUESTED

**Pursuant to Sections 0.457(d) and 0.459(a)(b)
of the Commission's Rules.**

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)

Flat Wireless, LLC, for and on behalf)
of its Operating Subsidiaries,)

Complainant,)

v.)

Cellco Partnership d/b/a Verizon Wireless,)
and its Operating Subsidiaries,)

Defendant.)

EB Docket No. 15-147
File No. EB-15-MD-005

LEGAL ANALYSIS OF VERIZON

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October 9, 2015

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

| | | |
|--|---|-----------------------|
| In the Matter of |) | |
| |) | |
| Flat Wireless, LLC, for and on behalf |) | EB Docket No. 15-147 |
| of its Operating Subsidiaries, |) | File No. EB-15-MD-005 |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | |
| |) | |
| Cellco Partnership d/b/a Verizon Wireless, |) | |
| and its Operating Subsidiaries, |) | |
| |) | |
| Defendant. |) | |

LEGAL ANALYSIS OF VERIZON

The Commission should dismiss Flat’s Complaint and declare that the roaming rates in Verizon’s last offer to Flat are reasonable and satisfy the Commission’s roaming orders.

INTRODUCTION AND SUMMARY

Flat’s Complaint is without merit. Verizon has not refused to offer roaming services to Flat and acted promptly and in good faith throughout the parties’ negotiations. The roaming rates Verizon offered Flat are well within the range of comparable roaming rates—including both the rates Verizon pays and the rates Verizon receives—under arm’s-length roaming agreements negotiated with others. Verizon’s rates appropriately preserve incentives to continue to invest in network improvements. Verizon thus satisfied the Commission’s standards, and its offered rates are “commercially reasonable” within the meaning of the Commission’s *Data Roaming Order* and “reasonable and not unreasonably discriminatory” as required by the Commission’s *Voice Roaming Orders*.

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The rates Flat demands, on the other hand are divorced from the Commission's standards. They are far below the range of comparable rates other carriers pay to roam on Verizon's world-class network and, if adopted, would extinguish Flat's incentives to expand its network facilities. If the Commission ordered Verizon to accept the below-market rates Flat demands, these rates would also seriously undermine Verizon's incentives to continue to make capital investments in new network technology and infrastructure.

The Commission should reject Flat's misguided legal positions. Flat's argument for cost-based rate regulation of roaming services is contrary to the long-settled regulatory judgment of the Commission, as established in the roaming orders. And its pleas for roaming rates keyed to particular retail pricing plans or to the lowest wholesale rates Verizon provides to a mobile virtual network operator ("MVNO") misunderstand the fundamentals of retail and wholesale pricing and misapply the Wireless Bureau's December 2014 *Declaratory Ruling*. Flat's musings about asserted anti-competitive effects lack a foundation in fact and fail to raise a claim proper for resolution in this proceeding.

In support of this brief and to assist the Commission, Verizon offers the accompanying Declaration of Dr. Hal J. Singer, a principal at Economists Incorporated and an expert in the economics of telecommunications networks and regulation. Dr. Singer addresses the economic considerations that distinguish roaming arrangements from a wireless carrier's retail pricing and wholesale service—considerations that should guide a proper application of the Wireless Bureau's *Declaratory Ruling*. And he explains the economic principles supporting the Commission's roaming standards and why, from an economic perspective, the rates Verizon

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offered Flat represent the fair market value of roaming on Verizon’s network as measured against market comparable rates.¹

LEGAL ARGUMENT

I. The Commission’s Roaming Standards Are Satisfied When Carriers Offer Rates that Fall Within the Range of Comparable Rates Negotiated with Other Carriers and that Preserve Both Parties’ Investment Incentives.

The Commission’s roaming orders contemplate that competing carriers will negotiate roaming agreements that satisfy their commercial objectives, while preserving each carrier’s incentives to invest in its own network and preventing one carrier from subsidizing the other through below-market roaming. The *Data Roaming Order* establishes a standard of good faith negotiation and “commercially reasonable terms and conditions,”² and the *Voice Roaming Orders* require that carriers offer voice roaming rates that are “reasonable and not unreasonably discriminatory.”³

In judging the reasonableness of roaming rates under the Commission’s standards, arm’s-length roaming agreements entered into between the parties or with other carriers in the marketplace provide the most appropriate benchmarks. The “commercial reasonableness” standard gives carriers “flexibility” to “negotiate different terms and conditions on an individualized basis, including prices, with different parties.”⁴ In evaluating proffered rates, the Commission looks to “whether the parties have any roaming arrangements with each other . . .

¹ Declaration of Hal J. Singer ¶ 2 (Oct. 9, 2015), EB Dkt. No. 15-147 (filed Oct. 9, 2015), appended hereto as Exhibit A (“Singer Decl.”).

² See *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd. 5411 ¶¶ 1, 13, 42, 68, 85-86 (2011) (“*Data Roaming Order*”); 47 CFR § 20.12(e)(1).

³ See *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd. 4181 ¶ 18 (2010) (“*2010 Voice Roaming Order*”); 47 CFR § 20.12(d).

⁴ *Data Roaming Order* ¶¶ 45, 68.

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and the terms of those arrangements” and any “previous data roaming arrangements with similar terms.”⁵ And the standard for voice roaming ensures “that the rates individual carriers pay for automatic roaming services [will] be determined in the marketplace through negotiations between the carriers,” based on the Commission’s “preference for allowing competitive market forces to govern rate and rate structures,” thereby fostering “a variety” of “reasonable pricing plans and service offerings.”⁶

The roaming orders thus expressly anticipate variations in negotiated rates depending on the circumstances and business needs of different carriers. Contrary to Flat’s arguments, the Commission’s standards do not mandate any particular roaming rates, whether based on retail pricing, wholesale rates, or a cost-of-service estimate.⁷ The Commission repeatedly “decline[d] to impose a price cap or any other form of rate regulation on the fees carriers pay each other when one carrier’s customer roams on another carrier’s network.”⁸

Evaluating rate offers by reference to the range of comparable commercial roaming contracts negotiated with other carriers in the market is fundamental to preserving the parties’ incentives to invest in their networks. The Commission recognized that a “potential cost” of obligatory roaming arrangements “is the possibility that requesting providers will substitute roaming for investment in coverage and accordingly under-invest in deploying new

⁵ See *id.* ¶¶ 45, 68, 86.

⁶ *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817 ¶¶ 35, 37 (2007) (“2007 Voice Roaming Order”).

⁷ See Complaint ¶¶ 20-44.

⁸ 2007 Voice Roaming Order ¶ 37; see *id.* ¶ 39 (“Capping roaming rates by tying them to a benchmark based on larger carriers’ retail rates may diminish larger carriers’ incentives to lower retail prices” and “may also give smaller regional carriers an incentive to reduce, or even eliminate, the discounts they offer on regional calling plans.”).

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infrastructure.”⁹ By “obligat[ing] the host provider only to offer data roaming on commercially reasonable terms and conditions,” the Commission intended to “provide the requesting provider with sufficient incentive to invest in facilities” wherever economically feasible and to ensure “that the data roaming obligation does not create mandatory resale obligations.”¹⁰

The Commission concluded that encouraging investment in broadband networks by all facilities-based carriers, large and small, is pro-competitive.¹¹ In reaching that conclusion, the Commission acknowledged that “the relatively high price of roaming compared to providing facilities-based service” (*i.e.*, retail or wholesale rates) is often appropriate “to counterbalance the incentive to scale back deployments in favor of relying on another provider’s network.”¹² At the same time, the Commission found that “a general requirement of commercial reasonableness” based on market rates, “rather than a more specific prescriptive regulation of rates,” will preserve “incentives for host providers to invest and deploy advanced data networks,” a strongly pro-competitive result.¹³

For these reasons, in all its roaming orders, the Commission “continue[d] to support the goal of promoting facilities-based competition by providing incentives for carriers to construct

⁹ *Data Roaming Order* ¶ 34.

¹⁰ *Id.*

¹¹ *See id.* ¶¶ 16, 21 & n.76; *see 2007 Voice Roaming Order* ¶ 40 (“regulation to reduce roaming rates has the potential to deter investment in network deployment by impairing buildout incentives facing both small and large carriers”).

¹² *Data Roaming Order* ¶ 51; *see 2007 Voice Roaming Order* ¶ 40 (“enabling smaller regional carriers to offer their customers national roaming coverage at more favorable rates without having to build a nationwide network . . . would tend to diminish smaller carriers’ incentives to expand the geographic coverage of their networks”).

¹³ *Data Roaming Order* ¶ 21; *see 2007 Voice Roaming Order* ¶ 40 (“reducing or eliminating any competitive advantage gained as a result of building out nationwide or large regional networks . . . would impair larger carriers’ incentives to expand, maintain, and upgrade their existing networks”).

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wireless network facilities on the spectrum available to them.”¹⁴ The *Data Roaming Order* thus provides that the Commission will consider: (1) “the extent and nature of providers’ build-out”; (2) the economic feasibility of building another network in the particular geographic area; (3) “whether the requesting carrier is seeking data roaming for an area where it is already providing facilities-based service”; (4) “the impact of the terms and conditions on the incentives of either provider to invest in facilities and coverage, services, and service quality”; and (5) “whether there are other options for securing a data roaming arrangement in the areas subject to negotiations,” including whether “alternative data roaming partners are available.”¹⁵

The commercial reasonableness analysis will also consider “the level of competitive harm in a given market and the benefits to consumers” likely to result from the terms and conditions the parties propose or from the refusal to enter into a roaming arrangement.¹⁶ The reference to “a given market” makes clear that any party challenging proffered rates based on alleged “competitive harm” must come forward with evidence of concrete harm to competition in one or more specific, properly defined local markets for wireless service. A party cannot rely on general or amorphous claims that proffered rates will harm competition or disadvantage a particular competitor. And to consider competition and consumer benefits the Commission also must encourage rates that maintain the parties’ incentives to invest in their own network infrastructure.

Each of the factors enumerated in the Commission’s orders points to the reasonableness of Verizon’s offers, and each undercuts Flat’s unsupported assertions that the radically low

¹⁴ *2010 Voice Roaming Order* ¶ 18.

¹⁵ *Data Roaming Order* ¶ 86. Consistent with the emphasis on negotiated agreements, the Commission’s roaming orders respect existing contracts entered into by the parties and treat the roaming rates and other terms and conditions established in those contracts as presumptively valid and binding. *Id.* ¶ 81.

¹⁶ *Id.* ¶ 86.

roaming rates it demands are required to preserve or promote “competition.” Flat’s proposed rates and the legal theories advanced in its Complaint are contrary to the principles enunciated in the roaming orders.

II. Verizon Negotiated in Good Faith and Offered Flat Reasonable Roaming Rates that Fully Accord with the Requirements of the Commission’s Roaming Rules.

Verizon complied with the requirements of the Commission’s roaming orders in responding to Flat’s proposal for a new roaming agreement, and the roaming rates Verizon offered Flat are reasonable and consistent with the Commission’s roaming rules and orders. Verizon did not refuse to negotiate in good faith and it responded promptly to Flat’s overture. It has offered roaming rates lower than the parties’ current contract provides and well within the range of roaming rates negotiated with other carriers for both inbound and outbound roaming.

Under the Commission’s orders, the range of comparable roaming rates found in commercial agreements negotiated on an arm’s-length basis is the touchstone for judging the reasonableness of offered rates and is the most important factor in that evaluation.¹⁷ The range of rates that many other carriers, both large and small, agreed to pay for roaming on Verizon is the best, most commercially relevant measure of the value that those carriers place on providing their subscribers access to the high-quality network Verizon built and operates. As Dr. Singer explains in his accompanying declaration, in economic terms, these comparable rates are the appropriate indicators of the fair market value of a roaming arrangement with Verizon and thus of the commercial reasonableness of the rates offered to Flat.¹⁸

Yet Flat’s Complaint reads as though Verizon’s comparable roaming agreements are irrelevant to the reasonableness of Verizon’s proffered rates. Flat simply asserts that because

¹⁷ See *Data Roaming Order* ¶¶ 45, 68, 86; *2007 Voice Roaming Order* ¶¶ 35, 37.

¹⁸ See Singer Decl. ¶¶ 2, 8.

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Verizon operates the nation's largest and most extensive CDMA network, every roaming rate Verizon agreed to with any other wireless carrier must be unreasonably high. But, as shown in the materials Verizon submitted in support of its Answer, the roaming rates Verizon offered to Flat are *lower than* the roaming rates Verizon pays to many other carriers, including in circumstances where Verizon is dependent on roaming and under contracts where Verizon is the *net payer* for roaming services.

Flat's effort to divert the Commission's attention from the most relevant commercial evidence of comparable roaming rates is not surprising, since the rates Flat demands are radically low—for data, far, far below the rates Verizon pays and receives for roaming services under any other arm's-length commercial agreement. This fact alone is sufficient to render Flat's roaming demands unreasonable under the Commission's standards and for the Commission to dismiss the Complaint. Certainly, Flat's Complaint does not come close to meeting Flat's burden in this proceeding to establish the reasonableness of the rates it demands.

Verizon's offered rates also advance the Commission's policy goal of promoting facilities-based competition by preserving both carriers' incentives to invest in their networks.¹⁹ Conversely, forcing Verizon to provide roaming at the rates Flat demands would undermine Verizon's incentives to invest in new technologies to improve its national network and the quality of its wireless service.²⁰ Because they are far below any reasonable market level, Flat's rates would force Verizon (and Verizon's customers) to subsidize Flat's operations, letting Flat freeload on Verizon's network as a virtual reseller. In this proceeding, Flat thus effectively seeks

¹⁹ See *Data Roaming Order* ¶¶ 16, 21, 34, 51; *2007 Voice Roaming Order* ¶ 40; *2010 Voice Roaming Order* ¶ 18; Singer Decl. ¶¶ 24 – 26.

²⁰ See Singer Decl. ¶ 25. These radically low rates would also destroy whatever incentives Flat may have to invest in network expansion. *Id.* ¶ 26.

“to create *de facto* mandatory resale obligations” at the lowest possible wholesale rate, a result the Commission specifically rejected in its roaming orders.²¹

III. Flat’s Contrary Legal Arguments Are Inconsistent with the Commission’s Roaming Orders, and the Commission Should Reject Them.

Instead of addressing the factors most relevant to a proper application of the Commission’s roaming orders and rules, Flat’s Complaint puts forward a series of alternative legal theories that are contrary to those orders and rules.

A. Flat’s Pleas for Cost-Based Rate Regulation and Uniform Tariffs for Roaming Fly in the Face of the Commission’s Previous Orders.

Flat claims the Commission should subject roaming arrangements, especially for voice roaming, to cost-based rate regulation and should require Verizon to provide roaming to all requesting carriers on the same terms and conditions—in effect, at tariffed roaming rates.²²

The Commission in its roaming orders rejected cost-based rate regulation for both voice and data roaming.²³ Contrary to Flat’s legal position, the “just and reasonable” standard of section 201(b) of the Communications Act does not mandate cost-based rates.²⁴ Flat’s approach would inevitably convert every roaming rate complaint proceeding into drawn-out litigation over the intricacies of the capital and operating costs of wireless networks and the economics of network access. The Commission correctly decided against roaming cost cases years ago.

²¹ See *Data Roaming Order* ¶ 44 (“automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks”) (quoting *2007 Voice Roaming Order* ¶ 51).

²² See Complaint ¶¶ 19, 22- 30, 34-37, 42-43, 50. Flat urges the Commission to reverse its long-standing decision to forbear from applying the automatic voice roaming rule to data roaming. See *id.* ¶ 32.

²³ See *2007 Voice Roaming Order* ¶¶ 37, 39; *Data Roaming Order* ¶ 86.

²⁴ See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 ¶ 664 (2003) (affirming that carriers may establish that offered rates are “just and reasonable” in accordance with section 201(b) by reference to “arms-length agreements” negotiated “with other, similarly situated purchasing carriers”).

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Equally misplaced is Flat's contention that Verizon's roaming rates are unreasonably discriminatory just because they vary among different carriers.²⁵ The Commission recognized that the negotiation of one-on-one roaming agreements will produce "a variety" of "reasonable pricing plans and service offerings," and the Commission approved "flexibility" to negotiate variations in roaming rates, reflecting the different needs and circumstances of different carriers.²⁶ The argument that section 202(a)'s prohibition on "unreasonable discrimination" mandates uniform rates for roaming is simply wrong as a matter of law. It is established law that section 202(a) does not mandate uniform rates for roaming.²⁷

B. Flat's Effort to Cap Roaming Rates Based on Retail and Wholesale Pricing Improperly Applies the Wireless Bureau's *Declaratory Ruling*.

In lieu of considering other roaming agreements negotiated in the marketplace, Flat asks the Commission to order Verizon to charge roaming rates capped by Verizon's advertised retail pricing or by the lowest wholesale rate Verizon offers to an MVNO.²⁸ The retail pricing plans Flat cites and the terms and conditions of Verizon's wholesale arrangements with large MVNOs are not appropriate reference points to judge Verizon's offered roaming rates in this case and cannot dictate a reasonable voice or data roaming rate.

These arguments misinterpret and misapply the Wireless Bureau's December 2014 *Declaratory Ruling*. The Wireless Bureau's ruling simply held that in applying the commercial reasonableness standard of the *Data Roaming Order* to the totality of circumstances in a

²⁵ See Complaint ¶¶ 10, 17, 20-37.

²⁶ 2007 Voice Roaming Order ¶¶ 35, 37; Data Roaming Order ¶¶ 45, 68.

²⁷ See *Orloff v. Vodafone AirTouch Licenses LLC*, 17 FCC Rcd. 8987 ¶ 24 (2002) (section 202(a) does not require cost-justification for differences in rates, terms, and conditions), *aff'd sub nom. Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

²⁸ See Complaint ¶¶ 23-30.

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particular case, it may be appropriate to consider “whether proffered roaming rates are substantially in excess of retail rates, international rates[,] MVNO/resale rates, [and] . . . domestic roaming rates as charged by other providers.”²⁹ The Bureau observed that substantial differences may be “potentially” relevant in a given case, or they may not be, but the *Declaratory Ruling* does not say that retail pricing or wholesale rates will be the benchmark that determines the reasonable roaming rate.³⁰ The ruling also does not declare that roaming rates must equal retail or wholesale rates, and it does not provide guidance on when or how it is appropriate to consider these potential reference points in a particular proceeding. And, of course, the Bureau’s ruling does not alter the Commission’s mandate that roaming policies must preserve investment incentives and not allow requesting carriers to substitute mandatory roaming for voluntary resale.

Even if comparisons to retail pricing were appropriate under certain circumstances, the individual retail plans Flat cherry-picked do not provide a reasonable reference for judging Verizon’s offered rates in this case. Carriers typically negotiate roaming rates on a per-MB basis to compensate the host carrier for serving the sporadic, unpredictable, and situational coverage needs of the roaming carrier’s subscribers. There is no reliable, long-term stream of revenue for Verizon associated with a roaming carrier’s particular roaming customers, and there is no expectation that those roaming customers will maximize their use of the Verizon network, let alone put all of their communications traffic on Verizon.

²⁹ Wireless Bureau, *Declaratory Ruling, In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 29 FCC Rcd. 15483 ¶ 9 (2014) (“*Declaratory Ruling*”).

³⁰ *Id.* ¶ 17 (stating that the Commission would consider arguments as to why certain other rates would be potentially relevant as reference points, as well as why they would not be relevant); *id.* ¶ 18 (the “reference points do not function as a ceiling or as a cap on prices”). Verizon filed an application for review on January 20, 2015, challenging the *Declaratory Ruling*, and the points offered in this brief are without prejudice to Verizon’s pursuit of its application for review.

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In contrast to roamers, Verizon's retail customers on average deliver a steady stream of revenue to Verizon over a long period. And they generate a large and consistent volume of traffic for Verizon because of the value they place on the communications services they pay to receive from the Verizon network. Verizon prices retail service in order to generate this reliable stream of revenue over the life of the customer relationship while maximizing the efficient use of the Verizon network. For these reasons, Verizon regularly measures and reports the revenue-generating value of its network on the basis of average monthly revenue per retail postpaid account, or "ARPA."³¹ This ARPA figure is the number that Verizon uses to justify capital investments in network improvements, and it is the number that Verizon presents to Wall Street (to shareholders and potential lenders), because it accurately reflects the value that retail customers place on the high-quality wireless service they receive from Verizon.³²

For these reasons, as Dr. Singer explains, any appropriate comparison of retail pricing to roaming rates must take into account the opportunity cost (the lost stream of net revenue) to the host carrier if the roaming carrier were able to win away the host carrier's retail customers through the use of roaming.³³ None of Flat's simplistic per-GB retail pricing calculations takes into account this opportunity cost, and the Commission should reject Flat's attempt to benchmark roaming rates by reference to putative retail "rates."

³¹ See 2014 Verizon Annual Report, p.18, available at www.verizon.com/about/sites/default/files/2014_vz_annual_report.pdf (reporting ARPA of \$159.86 for Verizon retail postpaid wireless accounts in 2014); Singer Decl. ¶ 31.

³² Verizon generally does not calculate wireless revenue from retail plans on a per-MB basis for network planning or financial accounting purposes.

³³ See Singer Decl. ¶ 11 (In the retail context, "each customer makes a discrete choice to subscribe to a single carrier. To the extent that roaming access—or more precisely, an expanded footprint of a roaming carrier—alters this choice, one would expect this opportunity cost to be reflected in the roaming rate.").

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Similarly, Flat's attempt to use wholesale rates offered to MVNOs as a cap for roaming rates is also off track. In considering the wholesale rate Verizon provides to an MVNO, the Commission should recognize, first, that there is no regulatory requirement for Verizon to give an MVNO access to its network; [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL]³⁵

Second, Verizon's agreements with MVNOs have [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END

CONFIDENTIAL] In contrast, while roaming traffic does contribute to the overall utilization of Verizon's network, it does not and cannot deliver the same sustained revenues as large national resellers.

³⁴ See Singer Decl. ¶¶ 12 – 13.

³⁵ See Verizon Answer at Tab F, Response to Flat's Interrogatories; Singer Decl. ¶¶ 34 – 36.

As Dr. Singer discusses, any proper consideration of MVNO rates as a purported reference point for evaluating offered roaming rates must account for these differences.³⁶ Flat has not even tried to address these differences, so its arguments based on asserted wholesale rates are not helpful in this case, and the Commission should disregard them.

C. Flat's Assertions About the Competitive Effects of Verizon's Offered Roaming Rates Are Baseless.

Finally, Flat suggests that Verizon's rate offer in these roaming negotiations is an exercise of "market dominance" that will stifle Flat's ability to compete with large resellers and other providers.³⁷ It bases these assertions on the observation that Verizon has built the most extensive CDMA network with a "national footprint" that "exceeds that of any other CDMA carrier."³⁸ While the Commission's orders permit consideration of the competitive effects of denying reasonable roaming, Flat has failed to allege facts sufficient to support a claim of competitive harm in any defined relevant market.

The fact that Verizon operates the highest-quality, most extensive CDMA network in the United States says nothing about whether Flat has options for roaming from less extensive CDMA network carriers in any given local service area. Sprint offers CDMA service on a national basis, and other regional CDMA carriers are available to Flat in particular areas. And Flat can obtain roaming services through collaboration with these other CDMA carriers. For example, the Competitive Carrier Association's "Data Access Hub" is a nationwide roaming

³⁶ See Singer Decl. ¶ 35 (stating, "critical differences make comparisons between MVNO and roaming rates particularly vexing, as the requisite *ceteris paribus* condition of market comparables is not satisfied.").

³⁷ See Complaint ¶¶ 11-17.

³⁸ *Id.* ¶ 13.

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alliance that lets rural carriers and small urban carriers have roaming access to the CDMA networks of all the participating carriers, which include Sprint.³⁹

Even if there are distinct local service areas important to Flat where Verizon is the only CDMA carrier, Flat has made no allegations to show that the rates Verizon offered effectively preclude roaming or prevent Flat from competing effectively as a wireless provider. Verizon's proffered roaming rates will protect both parties' investment incentives and will thus enhance, not stifle, network-to-network competition among facilities-based wireless carriers, in accordance with the Commission's roaming standards and policies.⁴⁰

CONCLUSION

For these reasons, the Commission should rule that Verizon complied with the Commission's roaming orders and that the roaming rates Verizon offered Flat are commercially reasonable and not unreasonably discriminatory within the meaning of the Commission's roaming rules. The Commission should dismiss Flat's Complaint and reject the legal arguments made by Flat.

³⁹ See Marguerite Reardon, *Sprint to join rural operators in nationwide roaming hub*, CNET (Mar. 26, 2014), available at <http://www.cnet.com/news/sprint-to-join-rural-operators-in-nationwide-roaming-hub/>.

⁴⁰ Flat has recently amended its Complaint to add a claim for damages. See Flat Request for Waiver and Motion to Accept Amendment to Complaint, EB Dkt. No. 15-147 (filed Sept. 11, 2015). Flat has made no factual allegations sufficient to support a claim for damages, however, nor could it. This claim should be dismissed along with the rest of Flat's Complaint.

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Respectfully submitted,



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October 9, 2015

Exhibit A

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

| | |
|--|---|
| <hr/> | |
| In the Matter of |) |
| |) |
| Flat Wireless, LLC, for and on behalf |) |
| of its Operating Subsidiaries, |) |
| |) |
| Complainant, |) |
| |) |
| v. |) |
| |) |
| Cellco Partnership d/b/a Verizon Wireless, |) |
| and its Operating Subsidiaries, |) |
| |) |
| Defendant. |) |
| <hr/> | |

EB Docket No. 15-147
File No. EB-15-MD-005

DECLARATION OF DR. HAL J. SINGER

INTRODUCTION AND ASSIGNMENT

1. I have been asked by counsel for Verizon Wireless (“Verizon”) to provide an economic opinion on how to evaluate the competing offers of roaming rates in this dispute. Rather than establish an *ex ante* roaming rate by tariff, I understand that the Commission’s 2011 *Data Roaming Order* granted the parties to a roaming agreement the freedom to negotiate towards a “commercially reasonable” roaming rate, subject to an *ex post* review.¹ I also understand that the staff of the Wireless Bureau recently ruled in a 2014 Declaratory Ruling that the access provider’s retail pricing and the wholesale rate it charges to mobile virtual network operators (“MVNOs”) may be considered in some way as reference points to help inform the commercially reasonable rate “depend[ing] on the facts and circumstances of any particular case.”² The relevant question for an economist

1. See *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd. 5411 ¶¶ 1, 13, 42, 68, 85-86 (2011) (“*Data Roaming Order*”); 47 CFR § 20.12(e)(1).

2. Wireless Bureau, Declaratory Ruling, *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 29 FCC Rcd. 15483 ¶ 9 (2014) (“*Declaratory Ruling*”) (“In our view, the data roaming rule was intended to permit consideration of the totality of the facts and therefore to permit a complaining party to adduce evidence in any individual case as to whether proffered roaming rates are substantially in excess of retail rates,

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is when and how to use a “retail” or MVNO “wholesale” surrogate³ to inform the commercially reasonable standard.

2. Based on my review of the economic literature and the case materials, I offer the following opinions:

(a) In most circumstances relating to roaming arrangements between facilities-based wireless carriers, including the present one, “market comparables”—the market-determined rates arrived at by a willing buyer and seller for a comparable service—can reliably inform “fair market value” and thus the commercially reasonable roaming rate.⁴ As an economic matter, reference points such as those identified by the Wireless Bureau’s Declaratory Ruling should be given no weight in the presence of reliable market comparables. And it should come as no surprise that market comparables could be significantly higher than these reference points.

(b) Even if the Commission were to determine it appropriate to consider retail or wholesale pricing in evaluating the roaming rates offered by Verizon, these other reference points must be considered and applied in a manner consistent with economic principles and the policy objectives of the Commission’s roaming orders. For example, it is not economically meaningful to attempt to calculate a retail “rate” or consider retail pricing on a per Gigabyte (GB) basis as opposed to a per customer basis. Similarly, if the Commission must consider a wholesale surrogate in the absence of a reliable market comparable for roaming, the Commission should be cognizant of the important differences between access rates for MVNOs and roaming carriers, and even among different types of roaming carriers.

(c) Because market comparables are available in the instant dispute, and because there is no theoretical or empirical basis to mistrust those comparables, the retail and wholesale surrogates contemplated in the Declaratory Ruling provide little utility here.

international rates, and MVNO/resale rates, as well as a comparison of proffered roaming rates to domestic roaming rates as charged by other providers. As noted below, the probative value of these other rates as reference points will depend on the facts and circumstances of any particular case, including all of the factors set forth in the Data Roaming Order, and these other rates should be considered in conjunction with one another rather than in isolation.”).

3. Economists consider a surrogate to be a replacement or proxy, differing in kind and quality to the original which it replaces. *See, e.g.*, Kevin Caves & Hal Singer, *On the Utility of Surrogates for Rule of Reason Cases*, CPI ANTITRUST CHRONICLE (May 2015) (for an evaluation of surrogate tests used in antitrust).

4. *See, e.g.*, Faten Sabry & William Hrycay, An Economist’s View of Market Evidence in Valuation and Bankruptcy Litigation, May 22, 2014, available at http://www.nera.com/content/dam/nera/publications/archive2/PUB_AnalysisMarketEvidence_0614.pdf (“The fair market value is defined as the price at which an asset would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts. The three standard valuation approaches are the discounted cash flow approach, the market comparables approach, and the asset approach.”).

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Accordingly, Verizon's offer, which is grounded in market comparables, is more consistent with an economic understanding of what constitutes a commercially reasonable roaming rate.

QUALIFICATIONS

3. I am a principal at Economists Incorporated. Previously, I was a managing director at Navigant Economics, and before that, I served as president of Empiris. I have served as an adjunct professor at Georgetown's McDonough School of Business

4. I am co-author of the e-book *The Need for Speed: A New Framework for Telecommunications Policy for the 21st Century* (Brookings Press 2013), and co-author of the book *Broadband in Europe: How Brussels Can Wire the Information Society* (Kluwer/Springer Press 2005). I have published several book chapters and my articles have appeared in dozens of legal and economic journals.

5. I have testified before Congress on the interplay between antitrust and sector-specific regulation. My scholarship and testimony have been widely cited by courts and regulatory agencies. In several antitrust cases concerning class certification, the district court's order favorably cited my testimony. The FCC, the Federal Trade Commission, and the Department of Justice have cited my writings in agency reports and orders.

6. Although my consulting experience spans several industries, I have particular expertise in the media industry. I recently advised the Canadian Competition Bureau on a large vertical merger in the cable television industry. I also testified on behalf of Apple in a dispute over reasonable royalties for songs downloaded from the iTunes. I have served as consultant or testifying expert for other media companies, including AT&T, Bell Canada, Google, Mid-Atlantic Sports Network, NFL Network, Tennis Channel, and Verizon. In many of these matters, I estimated the value of licensing (or accessing) intellectual property.

7. I earned M.A. and Ph.D. degrees in economics from the Johns Hopkins University and a B.S. *magna cum laude* in economics from Tulane University.

I. MARKET COMPARABLES ARE GENERALLY THE BEST INDICATOR OF A COMMERCIALY REASONABLE RATE

8. As the "commercially reasonable" formulation indicates, a roaming rate offered by a carrier will satisfy the Commission's standards if the offered roaming rate would make commercial sense to reasonable entities. This concept of commercial reasonableness tracks closely the economic concept of fair market value, which turns on the willingness of buyers and sellers in the marketplace to consummate similar transactions. A standard approach to fair market value is the "market comparables"

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approach, which as the name also suggests, entails identifying comparable transactions in which similarly situated parties consummated agreements. In most cases, a market comparables approach will properly inform the commercially reasonable rate. This approach may not be available in all cases, and in some cases, a market comparables approach may perpetuate inefficient outcomes, even when it is available. In these special cases—and only in these cases—is it appropriate to consider other potential reference points.

A. Fair Market Value and the Concept of Opportunity Cost Versus Split of Incremental Profit

9. A roaming agreement is a special relationship for access between two *facilities-based* carriers. For ease of exposition, I refer to the access provider in a roaming agreement as the “host carrier,” and the access seeker as the “roaming carrier.” A roaming carrier is distinguishable from a pure reseller, in the sense that the former invests in and relies in part on its own facilities, whereas the latter relies entirely on a third party’s network. When establishing roaming rates, a major consideration (discussed further below) is not to permit roaming rates so low as to discourage either the roaming carrier or the host carrier from continuing to invest in network expansion and improvements.

10. When assessing roaming rates, fair market value is best measured by the market-determined roaming rates entered into by similarly situated wireless carriers. The Commission has expressly recognized that market comparables are the preferred approach to determining commercially reasonable roaming rates.⁵ Moreover, it has rejected the notion of cost-based regulation and price caps.⁶

11. If granting access permits the access seeker to compete directly with the host carrier, a commercially reasonable access rate should compensate the host carrier for the forgone retail (net) revenue stream.⁷ The fundamental problem in the access-pricing process is that each customer makes a discrete choice to subscribe to a single carrier. To the extent that roaming access—or more precisely, an expanded footprint of a roaming

5. The “commercial reasonableness” standard gives carriers “flexibility” to “negotiate different terms and conditions on an individualized basis, including prices, with different parties,” and in evaluating proffered rates, the Commission looks to “whether the parties have any roaming arrangements with each other . . . and the terms of those arrangements” and any “previous data roaming arrangements with similar terms.” See *Data Roaming Order* ¶¶ 45, 68, 86.

6. See *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd. 4181 ¶ 37 (2010) (“2010 Voice Roaming Order”); 47 CFR § 20.12(d); see *2010 Voice Roaming Order*, ¶ 39 (“Capping roaming rates by tying them to a benchmark based on larger carriers’ retail rates may diminish larger carriers’ incentives to lower retail prices” and “may also give smaller regional carriers an incentive to reduce, or even eliminate, the discounts they offer on regional calling plans.”).

7. For a review of efficient component pricing, see William J. Baumol & Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 YALE J. REG. 171 (1994).

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carrier—alters this choice, one would expect this opportunity cost to be reflected in the roaming rate.

12. In contrast, when the expected revenue stream for a retail customer is *not* put at risk by a roaming agreement, a commercially reasonable rate should represent a reasonable split of the incremental profits created for the access seeker. Consider the case of an MVNO, which markets its wireless broadband service to extremely price-sensitive or budget-constrained customers who prefer pre-paid plans. Because the host carrier could not market its services to these price-sensitive customers without cannibalizing its existing offerings, by creating slightly different products, the MVNO permits the host to engage in what economists call “second-degree price differentiation.”⁸ To the extent that these customers are truly incremental to the wireless broadband operator, there is no forgone revenue stream. Because there is no need to compensate the host carrier for its opportunity cost here (assuming excess capacity in the host carrier’s network), the access rate for an MVNO can be considerably less than that obtained by a roaming carrier that threatens to divert some of the host carrier’s customers.

13. There are two general cases in which a host carrier and an MVNO (as opposed to a roaming carrier) will voluntarily consummate an access agreement. First, some MVNOs are more efficient (relative to the host carrier) in retailing mobile service to the same set of customers targeted by the host carrier, leaving the MVNO a profit equal to the MVNO’s cost advantage;⁹ in this case, the host carrier will expect to be compensated for its forgone revenue stream. Second, some MVNOs are more efficient (relative to the host carrier) at selling mobile service to a new set of customers that are not likely to be served by the host carrier; in this case, there is no forgone revenue stream, leaving a greater opportunity for a split of incremental profits (equal to the newfound revenue stream) between the access seeker and the access provider.

14. There are other cases in which a host carrier and a *roaming carrier* (as opposed to an MVNO) will voluntarily consummate a roaming agreement. For example, a roaming carrier that does not market its services to customers inside the footprint of the host carrier, but instead requires access to the host’s network solely to provide its customers roaming outside of the roaming carrier’s footprint, does not threaten the host carrier’s revenue streams. This could apply to a rural carrier or a carrier operating in a remote area, who seeks to offer nationwide service. In these cases—when the host carrier’s revenue streams are not put at risk—the roaming rate will be based on some split of the incremental profit created for the roaming carrier, made possible by enlarging the

8. See DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 303-05 (Addison Wesley 2005). Basic pricing theory shows a firm can increase profits by charging differently based on a buyer’s (or a group of buyers’) elasticity of demand. When arbitrage prevents such differential pricing, the firm chooses a second-best solution, in which the average elasticity is used to set prices uniformly.

9. In contrast, if the MVNO has the same costs as the host carrier, and if the access price is set equal to the forgone net retail revenues, then the MVNO earns zero profits at prevailing retail rates.

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roaming carrier’s network. Economics cannot place a precise value on how the roaming carrier’s incremental profit will be shared.¹⁰

15. In contrast, a roaming carrier that markets its services to customers inside the footprint of the host carrier imposes an opportunity cost on the host—namely, with an expanded footprint, the roaming carrier could induce existing (or potential) customers of the host carrier to switch to the roaming carrier, thereby threatening the host carrier’s revenue streams; in this case, one would expect the roaming rate to be based on the host carrier’s opportunity costs. Table 1 summarizes the discussion.

**TABLE 1: WHEN ACCESS PRICING IS BASED ON OPPORTUNITY COSTS
VERSUS SPLIT OF INCREMENTAL PROFIT**

| Access Seeker | Markets to New/Non-Overlapping Customers | Markets to Existing/Overlapping Customers |
|------------------------|---|--|
| MVNO | Split of Incremental Profit* | Opportunity Cost |
| Roaming Carrier | Split of Incremental Profit** | Opportunity Cost |

Notes: * Based on newfound revenue streams for the MVNO. ** Based on incremental value of expanded network for the roaming carrier.

B. Special Cases Under Which a Market Comparable May Not Be Commercially Reasonable

16. In certain narrow circumstances, the market-determined access rate described above may be unavailable. In other limited cases, the market-determined rate may be inefficient even though the access seeker voluntarily submitted to the rate. In these special cases, reference points may inform the commercially reasonable rate. Although the Commission has determined that some of these exceptions, such as the need to set *ex ante* rates to constrain market power, do not apply in the competitive wireless market,¹¹ it is worth mentioning them briefly here for completeness.

1. Special Case: Absence of market comparables

17. In some roaming disputes, close market comparables may not be available, in which case an alternative approach to measuring fair market value is needed. For example, the roaming agreements for a 4G network might not inform the commercially reasonable rates for a new 5G network that permits never-before-offered retail plans for

10. See, e.g., Kenneth Binmore, Ariel Rubinstein & Asher Wolinsky, *The Nash Bargaining Solution in Economic Modeling*, 17 (2) RAND J. ECON. 176-88 (1986); AVINASH DIXIT & SUSAN SKEATH, GAMES OF STRATEGY 524-47 (W.W. Norton, 1999).

11. *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817 ¶ 39 (2007) (“Capping roaming rates by tying them to a benchmark based on larger carriers’ retail rates may diminish larger carriers’ incentives to lower retail prices” and “may also give smaller regional carriers an incentive to reduce, or even eliminate, the discounts they offer on regional calling plans.”).

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mobile video subscriptions. In other cases, the host carrier may have an agreement with an MVNO that markets prepaid plans (with the aim of addressing under-served customers), but the access seeker is a roaming carrier that markets its service to existing customers within the host's territory. (Other critical differences between MVNO agreements and roaming agreements are explained below.)

18. This special case is not applicable here, since market comparable agreements for negotiated roaming rates, including both roaming rates paid to and paid by Verizon, are available. Verizon has compiled a database of over 50 active CDMA roaming agreements with domestic roaming partners.¹² I understand that none of the observations in the database involves agreements with MVNOs, which makes the sample reasonably comparable to Flat Wireless ("Flat"), which is also a roaming carrier. To an economist, the sample average is relevant because it serves as a simple prediction of the rates for any given roaming partner.¹³ [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED] [END HIGHLY CONFIDENTIAL]

2. Special Case: Retail monopoly power

19. When the access provider has a monopoly in the retail market, then the retail price that reflects the relevant opportunity costs (and preserves the retail revenue streams) may reflect monopoly prices, which could perpetuate inefficient output levels.¹⁶ Despite the fact that some access seekers may voluntarily pay this rate—for example, even at the monopoly rates, some resellers will have lower retail costs than the network owners—the resulting roaming rate may not represent a commercially reasonable rate.

20. Again, this special case is also not applicable here. Retail prices for mobile broadband service are falling and reflect intense competition among the four national providers, as well other regional providers. According to the Bureau of Labor Statistics, the prices for "wireless telephone services" have declined by roughly 13.5 percent over

12. See Verizon's Statement of Facts, Flat Answer as filed 9-15-2015 – HC, at 3-4.

13. This is why more sophisticated prediction models, such as regression forecasts, are judged on the ability to predict outcomes over and above what could be predicted with knowledge of the mean alone. See, e.g., RAMU RAMANATHAN, INTRODUCTORY ECONOMETRICS WITH APPLICATIONS 164 (Dryden Press 1992) (describing a prediction model's R-squared statistic).

14. Verizon's Statement of Fact, Appendix A.

15. *Id.*

16. Monopoly pricing creates what economists call a "deadweight loss" because the firm forgoes transactions with the consumers in which a potential gain to either the seller or buyer (or both) was not achieved. For a critique of the efficient component pricing rule when the access provide is a "local monopoly bottleneck," see Nicholas Economides & Lawrence Wright, *Access and interconnection pricing: How efficiency is the "efficient component pricing rule?,"* THE ANTITRUST BULLETIN 557-79 (Fall 1995).

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the past decade.¹⁷ And the major carriers are currently engaged in intense price competition. Retail competition ensures that the voluntary roaming rates do not reflect monopoly rents.

3. Special Case: Vertical integration with a must-have input

21. Another circumstance potentially leading to inefficient access pricing based on market comparables may arise when (a) the specific input for which access is sought is “must-have”—that is, failure to obtain access in the specific circumstances at issue would impair the access seeker’s ability to compete effectively in the downstream market—and (b) the input is owned by a firm that competes against the access seeker in an ancillary product market. A regional sports network owned by a cable operator is one example of this phenomenon.¹⁸

22. As was the case with monopoly retail power, this special case is also inapplicable here. The existence of several competing networks gives roaming carriers the ability to play one against the other. Access to Verizon’s network, as opposed to any other carrier’s network, is not “must have” because a roaming carrier with access to AT&T’s, Sprint’s or T-Mobile’s network (or any regional carrier’s network that covers the desired roaming area) would not be impaired in its ability to compete for retail wireless customers; that would only be the case if these other networks were perceived by customers to be so inferior to Verizon’s network that substitution was impossible.¹⁹ If Verizon were in sole possession of a must-have input, then it should be running away with the wireless prize; yet T-Mobile captured an impressive 70 percent of the growth in new wireless subscribers in 2014, twice as much as AT&T and Verizon combined, and an even larger share in the first quarter of 2015.²⁰

17. BLS, Consumer Price Index—All Urban Consumers, Series id: CUUR0000SEED03 (Dec. 2005 = 64.6% of Dec. 1997 prices; Dec. 2014 = 55.9% of Dec. 1997 prices), available at <http://data.bls.gov/cgi-bin/dsrv>.

18. Consider the licensing fee (an access rate) that is struck between a regional sports network (RSN) and two local providers of cable television service to be the “standalone rate.” Suppose that one of the two cable providers acquires the RSN. The vertically integrated cable operator has a fresh incentive to raise the access price above the standalone rate, as the integrated RSN can internalize a benefit that was not available to the independent RSN. See Kevin Caves, Chris Holt, & Hal Singer, *Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks*, 12(1) REVIEW OF NETWORK ECONOMICS (2013), available at <http://www.degruyter.com/view/j/rne.2013.12.issue-1/rne-2012-0022/rne-2012-0022.xml>.

19. For example, customers reported 11 problems per 100 mobile device interactions for Verizon, compared to 13, 16, and 18 for AT&T, T-Mobile, and Sprint, respectively. See J.D. Power, *Wireless Network Problem Incidence Increases as Texting and Web Use Grows*, Mar. 5, 2015, available at <http://www.jdpower.com/press-releases/2015-us-wireless-network-quality-performance-study—volume-1>. See also *Fastest Mobile Networks 2015*, PC MAGAZINE, June 22, 2015 (showing that Verizon ranked 89/100 in the mobile speed index, compared to 80, 69, and 84 for AT&T, Sprint, and T-Mobile, respectively), available at <http://www.pcmag.com/article2/0,2817,2485838,00.asp>.

20. Roger Entner, *Incentive Auctions: What Matters Here and Now*, May 14, 2015, Exhibit 2.

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23. Flat makes much of Verizon's CDMA network,²¹ one of two types of "multiple access" technologies used by U.S. wireless carriers (GSM being the other). Despite its ubiquitous nature and high quality, Verizon's CDMA network is not a "must-have" input for roaming carriers because (a) other facilities-based carriers besides Verizon use CDMA, and (b) CDMA carriers including Verizon are migrating to 4G LTE networks, closing the gap between CDMA and GSM. By historical accident, Sprint, Verizon and U.S. Cellular²² use CDMA because their predecessors switched from analog to digital around 1995-96, and CDMA was the newest technology at that time. In contrast, AT&T and T-Mobile use GSM.²³ By the time 4G technologies emerged, Verizon and Sprint chose not to install newer CDMA technology, but instead opted for 4G LTE to be more compatible with global standards. Thus, the CDMA-GSM split among U.S. carriers will close eventually as they move to 4G LTE.

C. Other Policy Considerations that Should Inform the Commercially Reasonable Standard

24. From a policy perspective, the commercially reasonable access rate should be sufficiently high to encourage continued network investment by both the access provider and the access seeker. The *Data Roaming Order* recognizes that a commercially reasonable rate must balance the incentives for new entrants and incumbent providers to invest in and deploy advanced networks across the country.²⁴ In its recent Declaratory Ruling, the Wireless Bureau explained that "the level of a requesting provider's build-out is a factor in determining the commercial reasonableness of a host provider's proffered terms, and we believe the Commission intended to review the matter under the case-by-case, totality of the circumstances approach."²⁵

25. Wireless providers invested \$33 billion in capital expenditures in 2013, and more than \$260 billion in the last decade²⁶ in broadband networks under the *belief* that their revenue streams would provide a sufficient return on investment; dilute those

21. Flat Wireless Complaint, Proposed Findings of Fact and Conclusions of Law, June 12, 2015, ¶ 2 ("Unless a roaming customer has access to Verizon Wireless's system, the roaming customer will not be able to complete calls in many portions of the United States. The only other nationwide, facilities-based CDMA wireless provider is Sprint, and Sprint's network is neither as deep nor as wide as Verizon Wireless's.").

22. U.S. Cellular's own-network coverage is mainly in the Pacific Northwest, Midwest, parts of the East and New England. It offers national coverage through roaming agreements. *See, e.g.,* Phil Goldstein, *U.S. Cellular to Launch LTE Roaming in Next 60-90 Days*, FIERCE WIRELESS, July 31, 2015, available at <http://www.fiercewireless.com/story/us-cellular-keeps-postpaid-subscriber-growth-chugging-along-q2/2015-07-31> ("The partner is likely a Tier 1 carrier, so U.S. Cellular customers will get access to a more robust and nationwide LTE network.").

23. Sascha Segan, *CDMA v. GSM: What's the Difference?*, PC MAGAZINE, Feb. 6, 2015, available at <http://www.pcmag.com/article2/0,2817,2407896,00.asp>.

24. *Data Roaming Order* ¶ 13.

25. *Declaratory Ruling* ¶ 28.

26. CTIA, *Wireless Quick Facts*, available at <http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts>.

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revenue streams too aggressively and the incentives for these investments disappear. Verizon was the first U.S. carrier to invest in LTE technology.²⁷ According to its financials, Verizon Wireless spent \$9.4 billion in capital expenditures in 2013 and \$10.5 billion in 2014,²⁸ and much of these expenditures went toward LTE technology.²⁹ An artificially low roaming rate would permit an access seeker to sit back and cherry pick that investment rather than make investments in improving its own network to compete with Verizon. Yet an explicit goal of the *Data Roaming Order* was to provide incentives to “those providers to invest and deploy advanced data networks, and avoid potential disincentives for those providers to invest.”³⁰

26. Investment incentives are particularly important because wireless carriers are continually upgrading their networks. Current 4G technology is just the current flavor, but it followed 3G, and it will soon be followed by 5G.³¹ If wireless investment were complete, it might be possible to construct an economic model showing that a bright-line rule tethered to an access provider’s incremental costs maximized short-term consumer welfare. But when an industry is as dynamic as wireless, investment is never complete, and attempts to appropriate “sunk” investment will surely backfire. Mandating access at cost-based rates makes sense only when the market has reached the end-state of technology development; by effectively locking in the last generation of technology, a policy of cost-based regulation for roaming would become a self-fulfilling prophesy, as it would significantly dampen the incentives of wireless providers to innovate. In sum, mandated low roaming rates would deter facilities-based build-out.

II. POTENTIAL UTILITY OF REFERENCE POINTS IN THE ABSENCE OF RELIABLE MARKET COMPARABLES

27. In this section, I review the potential utility of two proposed reference points in the Wireless Bureau’s Declaratory Ruling: (a) retail pricing and (b) wholesale (MVNO) pricing. I explain both the pitfalls (when improperly administered) and the utility (when properly administered) of using such surrogates when reliable market comparables are not available.

27. Roger Cheng, *Verizon to be the first to field-test crazy-fast 5G wireless*, CNET, Sept. 8, 2015 (“The New York-based company was one of the first carriers in the world to employ 4G technology back when it announced it would begin trials in 2008.”)

28. Verizon 2014 Annual Report, Management Discussion and Analysis, at 26, available at http://www.verizon.com/about/sites/default/files/2014_vz_annual_report.pdf.

29. *Id.* (“Capital expenditures increased at Wireless in 2013 compared to 2012 in order to substantially complete the build-out of our 4G LTE network.”).

30. *Data Roaming Order* ¶ 21.

31. Roger Cheng, *Verizon to be the first to field-test crazy-fast 5G wireless*, CNET, Sept. 8, 2015 (“Verizon’s tests have shown a connection speed that is 30 to 50 times faster than our current 4G network, or higher speeds than what Google Fiber offers through a direct physical connection into the home, Gurnani said.”).

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A. Retail Pricing

28. In its Declaratory Ruling, the Wireless Bureau declined to embrace T-Mobile's proposed surrogate test, which would have established a presumption that any roaming rate in excess of the access provider's retail "rate" expressed on a per *GB* basis was not commercially reasonable.³² In contrast, the host carrier's retail revenue stream on a per customer basis may be a useful reference point in considering the commercial reasonableness of offered roaming rates in certain circumstances where market comparables are not available.

1. Pitfalls when improperly administered

29. The basic problem with the retail-pricing surrogate as proposed by T-Mobile is that a wireless carrier's revenue stream from a given retail customer is not meaningfully divisible by the customer's usage. Consider the following illustrative example: Assume Verizon competes with Flat (in addition to other national or regional wireless providers) for retail customers in Abilene, Texas.³³ Assume that Flat has deployed its own network in Abilene, and assume further that certain Abilene-based mobile users periodically commute to Fort Worth, the largest metropolitan city to the east of Abilene. Finally, assume that each commuter consumes ten percent of the commuter's monthly data usage on the highway, and no such commuter (or a business employing the commuter) would ever subscribe to a wireless carrier that did not cover the 149 (rural) miles on Interstate 20 between Abilene and Fort Worth.

30. By providing highway coverage to Flat via roaming, Verizon would create a new option for wireless customers in Abilene and Fort Worth that did not previously exist. It would now be possible for a commuter who previously would have opted for Verizon to opt instead for Flat. The retail revenue stream that Verizon would put at risk through such a roaming agreement would not be just the incremental revenues associated with the commuter's data usage over Interstate 20. Instead, the entirety of Verizon's retail revenue stream for that customer would be put at risk.

32. Declaration of Joseph Farrell, D.Phil. In Support of Petition for Expedited Declaratory Ruling of T-Mobile USA, Inc., May 19, 2014, ¶ 57 ("In this section I discuss several benchmarks that the Commission should consider in drafting prospective guidance for the industry and also in evaluating whether a proposed wholesale data roaming rate is "high" in a sense relevant to determining whether it is commercially unreasonable."), available at <http://apps.fcc.gov/ecfs/document/view?id=7521151798>. *Id.* ¶ 60 ("In light of the reasons to fear anticompetitive pricing in these markets for cooperation among rivals, and in combination with other benchmarks, excessive price discrimination in the form of a much higher price charged to rivals than charged to customers should sharpen concerns.").

33. Flat, which operates under the name ClearTalk Wireless, is based in Lubbock, Texas. Bloomberg, Company Overview of ClearTalk Wireless, available at <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=83913581> (viewed Aug. 31, 2015). Flat has retail outlets in a handful of western cities in the state, including two in Abilene. See ClearTalk Wireless, Store Locator, available at <http://www.cleartalkwireless.com/store-locator/search/> (viewed Aug. 31, 2015).

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31. Calculating the forgone revenue stream is straightforward. For retail post-paid wireless customers, Verizon enjoys an average revenue per account of \$159.86 per month,³⁴ which turns out to be \$55.70 per connection (equal to \$159.86 divided by 2.87 retail postpaid connections per account).³⁵ Of course, not all of those revenues fall to Verizon's bottom line, but the portion that does represents an opportunity cost. A retail surrogate expressed on a per GB basis does not account for this forgone revenue stream.

TABLE 2: VERIZON'S PLANS EXPRESSED ON A PRICE PER GB BASIS

| GB Included | Price | Implied Price Per GB |
|-----------------------|----------------|---------------------------------|
| 1 | \$30.00 | \$30.00 |
| 3 | \$45.00 | \$15.00 |
| 6 | \$60.00 | \$10.00 |
| 12 | \$80.00 | \$6.67 |
| SIMPLE AVERAGE | | \$15.42 |

Source: <http://www.verizonwireless.com/landingpages/cell-phone-plans/>

Note: Assumes naively that each plan is equally popular, each customer consumes exactly her allotted data, and does not account for the associated fees required to access data, which could increase expenditures.

Recall that in the illustrative example, the commuter consumes ten percent of her monthly data usage on the highway. To arrive at a roaming rate, the retail surrogate seeks to allocate retail rates to the highway-related usage, based on an artificial retail price per GB. According to Table 2, which operationalizes the retail surrogate, Verizon earns on average \$15.42 per GB assuming naively that each plan is equally popular. Suppose the average Verizon user consumes 3 GB per month of data, and that each customer consumes exactly her allotted data.³⁶ If Verizon asked for anything more than \$4.63 per subscriber per month (equal to 10% of data consumed while roaming x 3 GB average usage per month x \$15.42 "average price per GB"), Verizon's offer would violate a standard rigidly pegged to Verizon's retail rate plans. But the roaming rate that would make Verizon indifferent between serving the customer indirectly (via a roaming agreement) and directly (as a retailer) would be significantly higher than just the sliver of incremental revenue that Flat is offering to pay.

2. Utility when properly administered

34. Verizon Communications, S.E.C. FORM 10-K, 2014 Annual Report, at 18, *available at* http://www.verizon.com/about/sites/default/files/2014_vz_annual_report.pdf.

35. *Id.*

36. Although Flat advocates for a retail surrogate, it cannot offer a concrete methodology that addresses the challenges for implementing such an approach. Arbitrary assumptions needed to employ a retail surrogate expose its limitations as a useful valuation metric.

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32. The foregoing example illustrates how retail pricing may be considered in an economically meaningful manner to help inform the commercial reasonableness of an offered roaming rate in the event that market comparables are not available. In the case of a roaming carrier that competes directly with a host carrier, one relevant retail surrogate could be the average revenue per connection. Because the host carrier does not keep 100 percent of those revenues, however, it is appropriate to discount them by the relevant margin. In the case of a roaming carrier that does not compete directly with a host carrier, there is no opportunity cost (assuming excess capacity on the network), in which case the host carrier's retail pricing is uninformative.

B. Wholesale Pricing

33. In its Declaratory Ruling, the Wireless Bureau declined to embrace T-Mobile's alternative surrogate test, which would have established a presumption that any roaming rate in excess of the access provider's MVNO wholesale rate was commercially unreasonable.³⁷ In contrast, MVNO rates may provide some utility in considering the reasonableness of roaming rates only when they are calibrated to account for the differences between the different types of access seekers—and, once again, only in circumstances where reliable market comparables for roaming rates are not available.

1. Pitfalls when improperly administered

34. Wholesale rates provided to an MVNO are not appropriate surrogates for roaming rates offered to a roaming carrier that competes directly against the host carrier for at least two reasons. *First*, as explained above, MVNOs generally allow a wireless operator to reach a customer base that is not otherwise accessible under the wireless operator's current pricing regime. The host carrier does not need to be compensated for its typical forgone retail revenue streams when the reseller brings new customers to the equation. Accordingly, an access rate offered to an MVNO may be significantly less than that offered to a roaming carrier that competes directly with the host carrier.

35. **[BEGIN CONFIDENTIAL]** 

[END CONFIDENTIAL] These critical differences make comparisons between MVNO and roaming rates particularly vexing, as the requisite

37. Farrell Declaration ¶ 57.

ceteris paribus condition—all other things held equal—of market comparables is not satisfied.

36. Extending a more generous MVNO access rate to a roaming carrier could perversely encourage the roaming carrier to abandon its own network and become a pure reseller, which would be directly inconsistent with the objectives of the *Data Roaming Order* and section 706 of the Telecommunications Act.

2. Utility when properly administered

37. It goes without saying that an MVNO rate for an existing reseller that targets a new audience represents a potential market comparable for a similarly situated new reseller. Similarly, an MVNO rate for an existing reseller that targets the same customers as the host carrier (but does so more efficiently) represents a potential market comparable for a similarly situated new reseller. The problem occurs in the mapping from an MVNO rate to a roaming carrier rate.

38. In two cases, this mapping might be feasible when a direct market comparable (with a similarly situated roaming carrier) does not exist. These cases are represented as vertical movements along the same column in Table 1. For a roaming carrier that markets its service to non-overlapping customers, the access rate extended to an MVNO that markets service to new customers might serve as a reasonable reference point; both rely on a split of surplus. In addition, for a roaming carrier that markets its service to overlapping customers, the access rate extended to an MVNO that markets service to existing customers might serve as a reasonable reference point; both rely on the host's opportunity costs. Of course, additional adjustments to the relevant MVNO rate might be needed to account for other differences in the rates, including volume discounts.

III. ASSESSMENT OF COMPETING OFFERS PURSUANT TO THE COMMERCIALY REASONABLE STANDARD

In this section, I review the offers from Verizon and Flat to determine which is more closely grounded in market comparables. Table 3 summarizes the results.

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[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL] In contrast, Flat's offer does not appear to be grounded in market comparables. [BEGIN HIGHLY CONFIDENTIAL]

³⁸ [END HIGHLY CONFIDENTIAL]

CONCLUSION

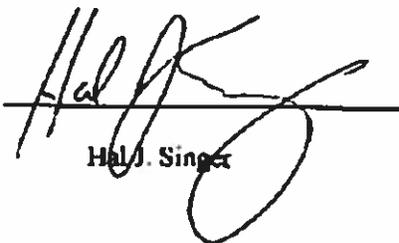
39. In most circumstances relating to roaming arrangements between facilities-based wireless carriers, including the present one, market comparables can reliably inform fair market value and thus the commercially reasonable roaming rate. Because a large sample of market comparables is available, and because there is no basis to mistrust those market comparables, the potential utility of reference points is largely academic. Verizon's offer, which is more closely grounded in market comparables, is more consistent with an economic understanding of what constitutes a commercially reasonable roaming rate.

38. See Verizon's Statement of Facts, Flat Answer as filed 9-15-2015 – HC, at 5.

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Verification Page

I hereby swear under penalty of perjury that the foregoing is true and correct.



Hal J. Singer

Dated: October 9, 2015

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APPENDIX 1: MATERIALS RELIED UPON

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APPENDIX 2: CURRICULUM VITAE

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Education

Ph.D., The John Hopkins University, 1999; M.A. 1996, Economics
B.S., Tulane University, *magna cum laude*, 1994, Economics. Dean's
Honor Scholar (full academic scholarship). Senior Scholar Prize in
Economics, 1994.

Current Position

ECONOMISTS INCORPORATED, Washington, D.C.: Principal 2014-
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Employment History

NAVIGANT ECONOMICS, Washington, D.C.: Managing
Director, 2010-2013.

GEORGETOWN UNIVERSITY, MCDONOUGH
SCHOOL OF BUSINESS, Washington, D.C.: Adjunct
Professor, 2010, 2014.

EMPIRIS, L.L.C., Washington, D.C.: Managing Partner
and President, 2008-2010.

CRITERION ECONOMICS, L.L.C., Washington, D.C.:
President, 2004-2008. Senior Vice President, 1999-2004.

LECG, INC., Washington, D.C.: Senior Economist, 1998-
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U.S. SECURITIES AND EXCHANGE COMMISSION,
OFFICE OF ECONOMIC ANALYSIS, Washington, D.C.:
Staff Economist, 1997-98.

THE JOHNS HOPKINS UNIVERSITY, ECONOMICS
DEPARTMENT, Baltimore: Teaching Assistant, 1996-98.

Authored Books and Book Chapters

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American Economics Association

American Bar Association Section of Antitrust Law

Reviewer

Journal of Risk and Insurance

Journal of Competition Law and Economics

Journal of Risk Management and Insurance Review

Journal of Regulatory Economics

Managerial and Decision Economics

Telecommunications Policy

**Before the
Federal Communications Commission
Washington, DC 20554**

| | | |
|--|---|-----------------------|
| In the Matter of |) | |
| |) | |
| Flat Wireless, LLC, |) | EB Docket No. 15-147 |
| |) | File No. EB-15-MD-005 |
| Complainant |) | |
| |) | |
| v. |) | |
| |) | |
| Cellco Partnership dba Verizon Wireless, |) | |
| |) | |
| Defendant |) | |

VERIZON WIRELESS OPPOSITION TO INTERROGATORIES

Cellco Partnership dba Verizon Wireless (“Verizon” or “Defendant”) opposes the request for interrogatories of Flat Wireless, LLC (“Flat” or “Complainant”) to the extent that request exceeds the agreement between the parties to produce the same information provided by Defendant in *NTCH v. Cellco Partnership*, EB Docket No. 14-212, File No. EB-13-MD-006 (“NTCH Complaint”).¹ That agreement, which was incorporated into the Notice of Formal Complaint,² says that (1) the parties will produce the same information in response to the Flat Complaint interrogatories as was provided to substantially similar interrogatories in the NTCH Complaint; and (2) the parties preserve the same objections to the Flat Complaint interrogatories

¹ The agreement between the parties (“Discovery Agreement”) is attached to the Notice of Formal Complaint issued by the Enforcement Bureau. *Flat Wireless, LLC v. Cellco Partnership dba Verizon Wireless*, Notice of Formal Complaint, EB Docket No. 15-47, File No. EB-15-MD-005 (Jul. 15, 2015) (“Notice of Formal Complaint”).

² Notice of Formal Complaint, at 2.

that were raised in response to substantially similar NTCH Complaint interrogatories.³

Verizon's general and specific objections to the Flat Complaint interrogatories are as follows:

GENERAL OPPOSITION TO INTERROGATORIES

Discovery of Additional Verizon Information Is Not Warranted. Section 1.729 of the Commission's rules does not allow discovery as a matter of right,⁴ and no further discovery from Verizon is warranted here. The documents and information provided by Verizon in the Complaint, Answer, Statement of Facts, Information Designation, Declarations, Legal Analysis,⁵ and produced under the Discovery Agreement have already "disclose[d] all [Verizon] information that is relevant to the resolution" of this matter,⁶ and as demonstrated below the remaining information Complainant requests is irrelevant to the Commission's resolution of the dispute.

Cost and Information Is Not Relevant. Section 1.729(b) requires that Complainant explain why the requested information is "necessary to the resolution of the dispute"⁷ For the reasons described in Verizon's Legal Analysis, Defendant's interrogatories about Verizon's costs of service are irrelevant to the material facts in dispute and are unnecessary to the

³Discovery Agreement, at 2. Copies of Verizon's objections to NTCH's initial and supplemental interrogatories are attached.

⁴ See 47 C.F.R. § 1.729(d).

⁵ Pursuant to an agreement reached by the parties, Defendant's Legal Analysis will be filed subsequent to this opposition. See Joint Motion to Revise Scheduling Order, EB Docket No. 15-147, File No. EB-15-MD-005 (filed Sep. 1, 2015, granted Sep. 2, 2015). Verizon will include with that Legal Analysis an updated version of this opposition to include citations to the appropriate sections.

⁶ *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22549 ¶ 118 (1997) ("Complaint Rules Order").

⁷ 47 C.F.R. § 1.729(b).

resolution of the dispute.⁸ The Commission has already held under the more liberal discovery rules prior to 1997 that where the reasonableness of rates is not dependent on a particular cost factor, such information is not relevant and is not appropriate for discovery.⁹ That same rationale applies with equal force under the even more restrictive current rules.¹⁰ Defendant specifically opposes the second sentence of interrogatory 3, and interrogatories 4, 6, 7, and 8 in their entirety for that reason and the Commission should deny them.

There Is No Valid Basis for Document Production. Defendant opposes Complainant's request to produce documents relating to the Interrogatories. Defendant opposes the request for documents in its entirety because Complainant has not provided any valid explanation of why the documents are "necessary to the resolution of the dispute" under 47 C.F.R. § 1.729(b).

Complainant's explanation that "[s]uch production will permit the Complainant to test and substantiate" Defendant's responses to the interrogatories was specifically considered and rejected as a valid basis for requiring discovery when the Commission adopted Section 1.729 of the rules.¹¹ The documents provided in the Complaint, Answer, Statement of Facts, Declarations, Information Designation, Legal Analysis, and produced in accordance with the Discovery Agreement are sufficient for resolution of the dispute, consistent with the "fact-based

⁸ Legal Analysis at 9-10.

⁹ See *Western Union Corp. v. Southern Bell Tel. and Tel. Co. et al.*, 5 FCC Rcd 4853, 4855 (1990) (private line rates "in order to be just and reasonable [need not] be based on physical routing characteristics or on the cost of the actual facilities used to provide service to a particular customer"), *further proceedings sub. nom. New Valley Corp. v. Pacific Bell*, 8 FCC Rcd 8126, 8127, 8128 n.24 (CCB 1993) (denying interrogatories as irrelevant that "attempt to elicit information regarding the costs incurred by PacBell" because Commission "has consistently rejected the view that the reasonableness of a private line rate must be based on the costs of the actual facilities used to provide service to a particular customer private line rates."), *aff'd on review* 15 FCC Rcd 5128, 5138 (2000) ("the information that would have been obtained by the interrogatories at issue is irrelevant").

¹⁰ See *Complaints Rules Order*, 12 FCC Rcd at 22549 ¶ 117 (disclosing party is "obligat[ed] to identify all information that is relevant to the facts in dispute" (emphasis added)).

¹¹ See *Complaints Rules Order*, 12 FCC Rcd at 22549, ¶ 118 (rejecting "argu[ments] that discovery is needed to verify the accuracy of initial disclosures").

pleading” design of the Commission’s rules.¹² Defendant further opposes Complainant’s document request because even if any of Interrogatories 1 through 8 seeks necessary and relevant information, documents are not necessary to provide responsive information for any of them. This request is overly broad and the burdens it imposes outweigh Complainant’s need, if any, for document discovery.

OPPOSITION TO SPECIFIC INTERROGATORIES

1. *Interrogatory 1 seeking domestic and international roaming rate information.*¹³

Under the Discovery Agreement, Defendant does not object to providing Complainant with the same domestic roaming information Verizon provided in *NTCH v. Celco Partnership*.¹⁴

Verizon opposes interrogatory 1 to the extent it seeks information beyond that which was agreed to in the Discovery Agreement. In addition to the reasons set forth in the General Opposition, the documents and information provided in the Complaint, Answer, Statement of Facts, Information Designation, Declarations, Legal Analysis, and the information produced pursuant to the Discovery Agreement are sufficient “to ensure the development of a complete record” such that further discovery from Verizon is not necessary.¹⁵

¹² See *id.* at 22529 ¶¶ 70-71.

¹³ This interrogatory uses the undefined term “internet service provider (ISP).” Defendant assumes for purposes of this Opposition that “ISP” means facilities-based mobile wireless service providers offering a data service subject to 47 C.F.R. § 20.12.

¹⁴ See Letter from Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division, to Donald J. Evans and Jonathan R. Markman, Counsel to Complainants, and Andre J. Lachance and Tamara Preiss, Counsel to Defendant, EB Docket No. 14-212; File No. EB-13-MD-006 (Apr. 2, 2015) (“NTCH Discovery Ruling”) at 2; Letter from Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division, to Donald J. Evans and Jonathan R. Markman, Counsel to Complainants, and Andre J. Lachance and Tamara Preiss, Counsel to Defendant, EB Docket No. 14-212; File No. EB-13-MD-006 (Jul. 24, 2015) (“NTCH Supplemental Discovery Ruling”) at 3 (ruling with respect to interrogatory 7).

¹⁵ See *Complaints Rules Order*, 12 FCC Rcd at 22549 ¶ 117.

Defendant also opposes interrogatory 1 to the extent it seeks information about international roaming agreements because Complainant has failed to establish why such information is necessary to resolve this Complaint. Defendant does not argue (or even mention) anywhere in the Complaint that international roaming rates are relevant to determining whether Verizon's offered rates are reasonable. The only support offered by Defendant for its international roaming rate request is a citation to the Wireless Bureau's Declaratory Ruling that a complaining party can seek to adduce evidence as to whether offered roaming rates are substantially in excess of international roaming rates.¹⁶ But that ruling only states that a complaining party "would be free to argue that other price-related facts (including, as specifically noted below, prices charged in other contexts) are relevant factors that the Commission should consider in assessing the commercial reasonableness of the price at issue."¹⁷ Here, Defendant has not argued that any rate offered by Verizon is unreasonable because it exceeds any international roaming rate. Also, Defendant has already provided domestic roaming rates which are the most comparable rates and thus the international roaming rates are not necessary to resolution of the dispute. For these reasons, Defendant is not entitled to discovery of international roaming rate information.

2. *Interrogatory 2 seeking information about offered rates that are not in effect.*

In addition to the reasons set forth in the General Opposition, Defendant opposes this interrogatory as irrelevant and immaterial because it relates to rates offered as part of negotiations rather than agreed-upon rates. Offered rates, by definition, are neither "charges ... in connection with the use of common carrier lines of communication" under Sections 201 and

¹⁶ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Declaratory Ruling, 29 FCC Rcd 15483, 15486 ¶ 9 (WTB 2014) ("WTB Declaratory Ruling").

¹⁷ *Id.*, 29 FCC Rcd at 15488 ¶ 15.

202 of the Act, nor “terms and conditions” of service under Sections 20.12(d) and (e) of the rules.¹⁸ Defendant opposes the second sentence of interrogatory 2 insofar as Complainant has not treated it as a separate interrogatory under 47 C.F.R. § 1.729(a).

3. ***Interrogatory 3 seeking information about the rationale for any difference in rates offered to Complainant.*** In addition to the reasons set forth in the General Opposition, Defendant opposes interrogatory 3 because, as set forth in Verizon’s forthcoming Legal Analysis, the information sought in the second sentence of Interrogatory 3 is neither relevant to the material facts in the proceeding nor necessary to the resolution of the dispute.

4. ***Interrogatory 4 seeking average cost information for each category of service.*** In addition to the reasons set forth in the General Opposition, Defendant opposes this interrogatory in its entirety because cost information is neither relevant to the material facts in the proceeding nor necessary to the resolution of the dispute.

5. ***Interrogatory 5 seeking information about the lowest retail and wholesale rates offered by Verizon.*** Under the Discovery Agreement, Verizon does not object to this interrogatory to the extent it requests the same information requested and provided in *NTCH v. Cellco Partnership*. Verizon opposes interrogatory 5 to the extent it seeks information beyond that which was agreed to in the Discovery Agreement. In addition to the reasons set forth in the General Opposition, the documents and information provided in the Complaint, Answer, Statement of Facts, Information Designation, Declarations, Legal Analysis, and the information produced under the Discovery Agreement are sufficient “to ensure the development of a

¹⁸ 47 U.S.C. §§ 201-202; 47 C.F.R. §§ 20.12(d)-(e). See Letter from Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division, to Donald J. Evans and Jonathan R. Markman, Counsel to Complainants, and Andre J. Lachance and Tamara Preiss, Counsel to Defendant, EB Docket No. 14-212; File No. EB-13-MD-006 (Apr. 17, 2015) (“NTCH Discovery Ruling Explanation”) at 2 (denying a similar interrogatory requested by NTCH finding that rates offered but not in effect “may well have no relevance to the material issues in dispute.”).

complete record” such that further discovery from Verizon is not necessary.¹⁹ Verizon opposes the request for rates that are still active on the Verizon network but no longer offered to new customers, because retail and MVNO rates that are no longer being offered are even less relevant to determining whether roaming rates are reasonable.²⁰

6. ***Interrogatory 6 seeking average monthly volume information for each service category.*** Verizon opposes this Interrogatory in its entirety. In addition to the reasons set forth in the General Opposition, Flat has failed to demonstrate that the information sought in interrogatory 6 is either relevant to the material facts in the proceeding or necessary to the resolution of the dispute.²¹ And this information is not readily available to Verizon.

7. ***Interrogatory 7 seeking information about the identity of individuals that are the source of the answers to the interrogatories.*** In addition to the reasons set forth in the General Opposition, Verizon opposes Interrogatory 7 to the extent it seeks information about interrogatories that Verizon opposes. Verizon also opposes interrogatory 7 to the extent it seeks information beyond that which Verizon has disclosed in the Information Designation, Affidavits, and Discovery Response.

8. ***Interrogatory 8 reserving the right to request additional interrogatories.*** Interrogatory 8 does not seek any information and does not require a response. Verizon is opposed to any additional discovery for the reasons set forth in the General Opposition.

9. ***Document Request.*** Verizon opposes Complainant’s request for documents for the reasons set forth in the General Opposition.

¹⁹ See *Complaint Rules Order*, 12 FCC Rcd at 22549 ¶ 117.

²⁰ See NTCH Supplemental Discovery Ruling at 2 (denying a similar discovery request by NTCH).

²¹ Legal Analysis at 9-14.

Respectfully submitted,

/s/

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September 15, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2015, copies of the foregoing letter and all attachments thereto were delivered by hand delivery to the following individuals:

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/s/
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